SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

NO. 344

KENNETH JORDAN BROWN, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Kenneth Jordan Brown, Petitioner, respectfully prays that a writ of certiorari be granted to review the judgment of the Court of Criminal Appeals of the State of Texas affirming a judgment of the 177th District Court of Harris County, Texas, adjudging the Petitioner guilty of the possession of heroin and sentencing him to imprisonment for ninety-nine years.

CITATION TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas has not yet been reported. A certified copy of the official opinion is attached hereto as Appendix A.

THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The judgment and opinion of the Court of Criminal Appeals of the State of Texas was delivered and entered on March 20, 1968. The Petitioner's motion for rehearing was overruled without written opinion, and the judgment of the Court of Criminal Appeals became final on May 8, 1968. (Certificate of Clerk of Court of Criminal Appeals, Appendix A.) Jurisdiction to review the judgment and decision of the Court of Criminal Appeals of the State of Texas by writ of certiorari is conferred upon this Court by Title 28, U.S.C.A., Section 1257(3) in that the Petitioner urges he has been denied rights, privileges and immunities accorded him by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Was there a lack of probable cause to issue a search warrant, and was evidence (heroin, a rent receipt and a statement made by Petitioner) obtained by virtue of that search warrant unlawfully seized and erroneously admitted, depriving Petitioner of rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, where the affidavit, the sole justification for the warrant being issued, read in pertinent part:

> ". . . On the 11th day of March, 1966, affiants received reliable information from a credible person, that heroin was being possessed by Kenneth Brown, at 1100 West Dallas Street, Houston, Harris County, Texas. Although I do not desire to

> name this person, on several occasions he has given information to me concerning narcotics being possessed by certain individuals, and on every occasion his information has proven to be true. Based upon the information he gave me, affiants on this day, the 11th of March, 1966, set up surveillance of the building located at 1100 West Dallas Street, and from 6:00 p.m. to 8:00 p.m. of this same date, we observed several persons who we knew to be users of narcotics, enter the building, remain for approximately five minutes each, and then leave."

stating only unsupported and uncorroborated hearsay conclusions of an unidentified informer without any information as to the underlying circumstances from which the informant concluded the narcotics were where he said they were?

2. Was the Petitioner deprived of constitutional rights accorded him by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and was evidence (heroin, a rent receipt and a statement made by Petitioner) erroneously admitted where the affidavits supporting the search warrants were mere forms on which officers changed the name, place, date and time of surveillance, and the magistrate issued the search warrants on a rubber stamp basis failing to make independent determinations that probable cause existed to issue the search warrant?

3. Was the Petitioner deprived of due process because his counsel was prevented from going behind the form affidavits supporting the search warrants to determine whether probable cause actually existed before the magistrates issued the two warrants by virtue of which the

officers obtained the evidence used in the conviction of the Petitioner?

4. Was the Petitioner's conviction based upon no evidence, and, consequently, was he deprived of due process accorded him by the Constitution of the United States?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> ". . . No State shall . . . deprive any person of life, liberty or property without due process of law; . . ."

The Fourth Amendment to the Constitution of the United States provides:

> "A right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

STATEMENT OF THE CASE

The Petitioner, Kenneth Jordan Brown, was convicted of the offense of unlawfully possessing heroin (R. pp. 103-104, judgment and sentence), a violation of Article 725(b), Vernon's Texas Annotated Statutes. His penalty was assessed by a jury at confinement in the Texas Department of Corrections for a period of ninety-nine years.

At approximately 9:15 p. m., nine City of Houston Police Officers assigned to the Narcotics Division (R. pp. 289, the return on search warrant, 256) armed with a search warrant (R. pp. 145, 146, 164, 168, 169, 174, 175, 202, 203, 298; R. Vol. II, pp. 289 and 290, affidavits and warrants), and firearms (R. pp. 155, 178, 204, 229, 268), entered a drugstore located quite close to the downtown area of the City of Houston which offered for sale as the main items non-prescription drugs and liquor. (R. pp. 144-145, 184, 185, 252). When the officers arrived to execute the search warrant, they found four or five persons or more (R. pp. 179, 229, 230, 257, 280), being employees or customers, on the premises. The Petitioner himself was in a back part, not a public part, of the store, lying down with his shoes and shirt off. (R. pp. 146, 155, 164, 224, 226, 258). He was brought into the portion of the store where the public had access, and a search of the store commenced. (R. pp. 202, 203, 205, 206, 225, 230, 231). After an exploratory search lasting for from thirty to forty-five minutes (R. pp. 179, 204, 258), the officers lifted a display counter in the center of the store to which the public generally had access. (R. pp. 166, 169, 170). Under the base of the display counter was found a brown paper bag which contained two plastic bags. (R. pp. 167, 168). The two plastic bags contained a brown powder which was later shown to be a rather large quantity of heroin. (R. p. 215). The sack containing the heroin was shown to the Petitioner and, although the testimony is disputed by employees who were present, the officers testified that when the sack containing the heroin was exhibited to the Petitioner, he said, "It is heroin. You have got me this time." (R. pp. 152, 188, 190, 277; conflicting testimony, pp. 262, 264, 265, 271). The Petitioner had not been

advised of his constitutional rights. (R. pp. 152, 224). The record reflects the Trial Court made a judicial finding that the Petitioner was under arrest when he made the statement. (R. p. 160). The Court of Criminal Appeals, however, "(held) the answer admissible as a statement made while not under arrest". (Opinion, Appendix A). The Petitioner was searched, and in his billfold was found a receipt for an apartment located at 1208 Peden Street, Apartment No. 3, (R. pp. 192, 193, 194, 209). The officers, at the time they came to the drugstore to search, and for some two hours prior thereto, had been armed with another search warrant issued by a magistrate to search the Apartment No. 3 located at 1208 Peden Street. (R., Vol. II, p. 290). After finishing their search at the drugstore, part of the officers took the Petitioner to the apartment for which they had the search warrant and for which they had found a rental receipt in the Petitioner's billfold. (R. pp. 194, 195, 246). This apartment was opened with a key in the possession of the Petitioner. (R. pp. 195, 196). A search of the apartment revealed a set of balances or scales suitable for the purposes of weighing drugs and three papers with traces of heroin, all of which were introduced into evidence. (R. pp. 196, 197, 198, 199, 216, 278). There was testimony that the Petitioner was the manager of the drugstore. (R. pp. 265, 272). Evidence shows that the store license (R. p. 251) and two liquor licenses (R. pp. 234, 235, 338, 339, 340) for the premises in force at the time were in the name of others than the Petitioner. Neither ownership nor the person having the right to legal possession of the drugstore premises was shown. (R. p. 164).

The prosecution attempted during the trial to justify the search of the drugstore under provisions of the liquor

license for the premises issued to one other than this Petitioner. (R. pp. 234, 235, 338, 339, 340). However, over strenuous objections from the Petitioner's counsel, the prosecution introduced evidence obtained from an apartment by virtue of the second search warrant. The effect of the damaging evidence cannot be separated. The legality of the seizure of the contraband should stand or fall on the validity of the search warrants and the supporting affidavits.

HOW FEDERAL QUESTIONS WERE RAISED

A. In the Trial Court

Prior to trial, a motion to suppress the evidence obtained by virtue of the execution of the search warrant was filed (R. pp. 5-10). The motion to suppress alleged a violation of the Petitioner's constitutional rights and a deprivation of due process under the provisions of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, because the affidavit for the search warrant did not contain sufficient facts to establish probable cause. (R. pp. 6-7) It was further alleged in the motion that the affidavit supporting the warrant in question was a "form", and that it was identical to all issued in Harris County, Texas, except for the name, date, place and time of surveillance. (R. p. 8).

A hearing on the motion was granted and evidence was heard. (R. pp. 141-161) The two search warrants relied upon by the prosecution in this case were introduced into the record. (Vol. II, R. pp. 289 and 290) The motion to suppress evidence was overruled and denied (R. pp. 12, 105 and 141), and an exception to the overruling of the motion was noted.

Objections to the introduction of the evidence unlawfully obtained were made throughout the trial and bills of exception made. (R. pp. 164-165, 188, 193, 196, 199, 210, 222-244, 244-250 and 278).

On the amended motion for new trial (R. pp. 47-61), Petitioner alleged a deprivation of constitutional rights afforded him by the Fourth, Fifth and Fifteenth Amendments to the Constitution of the United States because the affidavits for the search warrants did not show sufficient facts and circumstances independently corroborative of the hearsay contained in the affidavit, and that the affidavits were insufficient to support the search warrants under the decisions of the Supreme Court of the United States in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; *Giordinello v. United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503; and *Riggan v. Virginia,* 384 U.S. 152, 86 S.Ct. 1378, 16 L.Ed.2d 431. (R. pp. 47-48).

The Petitioner again fully briefed (R. Vol. III, Appellant's brief filed in the Trial Court) the same questions which are presented to this Honorable Court and submitted them in his appellate brief filed in the Trial Court in accord with the provisions of Vernon's Annotated Code of Criminal Procedure of Texas, Section 40.09 (9) and (12). A new trial was not granted by the Trial Court because the Trial Court felt bound by the case of *Acosta v. Texas,* 403 S.W.2d 434. (Appendix B).

B. In the Texas Court of Criminal Appeals

On appeal to the Court of Criminal Appeals for the State of Texas, the Petitioner submitted a full brief (R. Vol. III., Appellant's supplemental brief in the Court of

Criminal Appeals) setting forth all of the contentions he is now making. The same questions were presented and argued in oral argument before the Court. The Court of Criminal Appeals considered the questions here presented and, as indicated by its opinion, decided and stated that the affidavit was sufficient until such time as the Supreme Court of the United States should decide that it was not sufficient. (Opinion, Appendix A).

Again on motion for rehearing before the Court of Criminal Appeals of Texas, the Petitioner urged the Court to find the affidavit supporting the search warrants insufficient for the same reasons which are here now presented to this Honorable Court. His motion for rehearing was overruled without written opinion.

The opinion of the Court of Criminal Appeals and the record reflect that the Petitioner has raised the constitutional issues here relied upon from the time of the pretrial motion in the Trial Court until the Petitioner's motion for rehearing in the Court of Criminal Appeals was overruled.

ARGUMENT ON REASONS FOR GRANTING OF THE WRIT

I. The General Importance of the Questions Present Requires Review of this Case

A federal question of substance has been decided by the Texas Court of Criminal Appeals in a way probably not in accord with the applicable decisions of the Supreme Court of the United States, the decisions being: *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964); *Giordenello v. United States,* 357 U.S. 480, 78 S. Ct. 1245, 2 L.Ed. 1503 (1958); *Jones*

v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *Nathanson v. United States,* 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933); *Ventresca v. United States,* 380 U.S. 102, 85 S. Ct. 741; *Rugendorf v. United States,* 376 U.S. 528, 84 S. Ct. 825, 11 L.Ed.2d 887 (1964); *Riggan v. Virginia,* 384 U.S. 152, 86 S.Ct. 1378, 16 L.Ed.2d 431; *Barnes v. Texas,* 380 U.S. 253, 85 S. Ct. 942, 13 L.Ed.2d 818; *Etchieson v. Texas,* 378 U.S. 589, 84 S.Ct. 1932, 12 L.Ed.2d 1041; and *Santos v. Texas,* 380 U.S. 259, 85 S.Ct. 952.

If, as the Petitioner insists, such affidavits are insufficient, his is not an isolated case; there are numerous cases in which citizens have been and are being denied due process of law. The opinion in this case reflects that the Court of Criminal Appeals of Texas has decided at least three other cases since *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, was decided in which the affidavits supporting search warrants were identical to the two affidavits for search warrants in this case with the exceptions of the name, place, date and time of surveillance. The record in this case makes it abundantly clear that it is not only these few isolated cases in which the affidavits are identical to those in this case. The record shows that in a little over two months time, from January 1 until March 11 of 1966, one magistrate alone in Harris County issued thirty-eight warrants to officers of the Narcotics Squad where the affidavits presented were identical to those in this case. Based on this record and reasonable inference, it is apparent that literally hundreds of residences have been searched by narcotics officers armed with warrants issued by virtue of such affidavits since Aguilar was decided. An inspection of the record will reveal that according to

the return made on the warrants in a number of cases, no narcotics were found on the premises searched.[1]

If this Court's decision in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, is to mean anything, further direction and guidance must be given by this Court.

Acosta v. State, 403 S.W.2d 434, cert. den. 386 U.S. 1008, 87 S.Ct. 1352, 18 L.Ed.2d 449, was the first case decided by the Texas Court of Criminal Appeals after the decision in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, in which the Texas Court of Criminal Appeals held the affidavit identical to those in this case to be sufficient. In declining to review *Acosta v. Texas,* 403 S.W.2d 434, cert. den. 386 U.S. 1008, 87 S.Ct. 1352, 18 L.Ed.2d 449, Mr. Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Fortas noted that they were of the opinion that certiorari should be granted.

The Texas Court of Criminal Appeals, in the opinion in this case and in the opinions in other cases therein cited, states that there is a conflict in the decisions of the Federal Courts considering the sufficiency of affidavits which are in legal effect not distinguishable from those in this case. That Court further states that until such

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1. The returns on the thirty-eight warrants issued by one magistrate in Harris County between January 1 and March 11, 1966, show that in six cases no narcotics were found. (R. pp. 292, 259, 307, 308, 311, 329). In thirteen instances narcotics, dangerous drugs or paraphernalia was found. (R. pp. 293, 298, 300, 301, 303, 304, 306, 309, 312, 316, 323, 325, 328). Fourteen warrants which were obtained were returned by the officers not executed. (R. pp. 297, 302, 305, 310, 315, 317, 318, 319, 320, 321, 322, 323, 324, 326, 327). On five warrants issued no returns were made. (R. pp. 294, 296, 299, 313, 314). It is interesting to note that all of the affidavits state that the informant's information has on every occasion been true.

conflict is resolved by the United States Supreme Court, it will continue to hold such affidavits sufficient.

The need for further guidance from this Court is indicated by the numerous cases still arising in which lower courts are erroneously finding probable cause to be shown by affidavits based on hearsay conclusions of informants, unsupported by facts and circumstances. These cases are from a number of jurisdictions. See *United States v. Roth*, 391 F.2d 507, (7th Cir., 1968); *United States v. Soyka*, 394 F.2d 443 (2nd Cir., 1968); *Rogers v. Warden*, 381 F.2d 209 (2nd Cir., 1967); *DeNegris v. Menser*, 360 F.2d 190, (2nd Cir., 1966); *Spinelli v. United States*, 382 F.2d 871 (8th Cir., 1967); *United States v. Rollins*, 271 F.Supp. 18; *Foster v. Gilbert*, 264 F.Supp. 209.

It is respectfully suggested that the point raised by this case is so closely related to that raised by another case soon to be reviewed by this Court that they should be considered together. The case is that of *Spinelli v. United States*, 382 F.2d 871, (Cause No. 801, Supreme Court of the United States for the October, 1967, Term; Cause No. 8 in the October, 1968, Term), in which the Court granted review on March 4, 1968. On May 27, 1968, in the same case, this Honorable Court entered an order modifying the order granting petition for certiorari so as to limit the review of the case to the question of constitutional validity of the search and seizure.

II. On the First Question Presented

It is respectfully submitted that *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, controls the

disposition of this case and is authority for saying that the affidavits in this case are insufficient. There it was said:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant * * * the magistrate must be informed of some of the *underlying circumstances* from which the informant concluded that the narcotics were where he claimed they were, and some of the *underlying circumstances* from which the officers concluded that the informant was 'credible' or his information reliable. 378 U.S. at 114, 84 S.Ct. at 1514 (emphasis added)."

The requirement is plainly twofold. Unquestionably, the first requirement is not met by these affidavits. The affidavit in this case read as follows:

> " . . . On the 11th day of March, 1966, affiants received reliable information from a credible person, that heroin was being possessed by Kenneth Brown, at 1100 West Dallas Street, Houston, Harris County, Texas. Although I do not desire to name this person, on several occasions he has given information to me concerning narcotics being possessed by certain individuals, and on every occasion his information has proven to be true. Based upon the information he gave me, affiants on this day, the 11th day of March, 1966, set up surveillance of the building located at 1160 West Dallas Street, and from 6:00 p.m. to 8:00 p.m. of this same date, we observed several persons who we knew to be users of narcotics, enter the building, remain for approximately five minutes each, and then leave."

There are no underlying circumstances articulated from which the informant could have concluded that the nar-

cotics were where he said they were. The informant's information may have been hearsay to him or a mere guess. It is doubtful that the second requirement that the affidavits reveal the underlying circumstances attesting the reliability of the informant is present in these affidavits. It appears that officers have seized upon and misinterpreted Footnote 1 in the Aguilar opinion concerning surveillance. In all affidavits which they make, it appears a short surveillance reveals to them that "several persons who we knew to be users of narcotics entered the building, remained for approximately five minutes each and leave." In spite of the unlikelihood of this actually occurring in every instance, such observations could only tend to lend credibility to the informant's reliability. It could not make up the deficiency of the first requirement stated in the Aguilar opinion.

III. On the Second Question Presented

In *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, it was said:

> "Although the reviewing court will pay substantial deference to judicial determinations of probable cause the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for police."

The record in this case and the cases cited in the opinion by the Texas Court of Criminal Appeals demonstrate that if officers will complete a form with name, date, place and a time of surveillance, a search warrant will automatically be issued to search for narcotics. The magistrate is not judging for himself the persuasiveness of the facts relied upon by the complaining officers to show probable cause. He is accepting without question

the complainant's mere conclusions in all instances. The conclusions of the affiants are based on unsupported hearsay from unidentified informants. The magistrates are not performing their "neutral and detached" functions, but serve merely as a rubber stamp for police.

IV. On the Third Question Presented

The insufficiencies of the affidavits are accentuated by the fact that the Trial Court, under well-established authority in this jurisdiction (*Hernandez v. State*, 255 S.W.2d 219) would not permit the Petitioner's counsel to go behind the affidavit to determine whether probable cause actually existed at the time the magistrate issued the search warrant. (R. pp. 121, 126-129). It is, of course, the duty of the prosecution to make an affirmative showing that probable cause did exist, but where they do not, the rule preventing those accused from going behind the affidavit to show lack of probable cause is one which invites wrongdoing on the part of officers. The officers statement regarding the well-known users of narcotics observed by them on surveillance could not be ascertained. If they existed, their testimony as possible eye witnesses could have been valuable to the defense, and their names and identities should therefore have been revealed. If they did not exist, the affidavits containing such statements certainly could not support the search warrants. It is interesting to note that the two officers who made the affidavits in this case stated that they were on surveillance at one location at the very same time that the magistrate said that they applied to him for the other search warrant.[2]

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2. Both search warrants issued in this case were obtained upon the affidavits of officers R. Y. Garcia and D. G. McMannes. The Texas Code of Criminal Procedure provides that the magistrate must

V. On the Fourth Question Presented

Although the Texas Court of Criminal Appeals found that there was sufficient evidence to support the jury's verdict and the judgment of the Court in this case, it is respectfully submitted that the only evidence which supports the conviction is that the Petitioner was said to be the manager of the public premises where the contraband was found, and the equivocal statement made by him while under arrest and before he had been informed of

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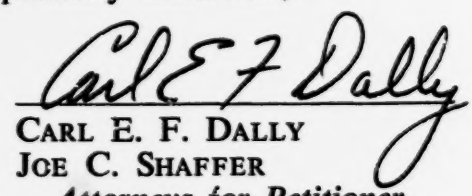
show the time that the affidavit was presented to him. (Article 18.15). Justice of the Peace Jack Treadway, the magistrate issuing the search warrant for Apartment No. 3 at 1208 Peden Street took the officers' acknowledgment and issued the warrant at 6:15 p.m., March 11, 1966. The same officers, in their affidavit presented to Sam T. Ing, Judge of the Corporation Court of the City of Houston, swore that they had had the premises at 1100 West Dallas Street under surveillance from 6:00 p.m. to 8:00 p.m., March 11, 1966. Judge Treadway's testimony was that he did not recall where he was and the circumstances of issuing the warrant which he issued. Obviously, for the officers' statement to have been true, Judge Treadway would have had to have been on surveillance with them near 1100 West Dallas Street. (R. Vol. II. pp. 289, 290). It is interesting to note that in the affidavits made by the various narcotics officers, a number of serious discrepancies occurred. For example, Officer K. R. Dunlap swore that on February 3, 1966, he was on surveillance as follows: From 7:00 p.m. to 9:00 p.m., 7921 John Street (R. p. 315), and from 6:00 p.m. to 11:30 p.m., 404 Westheimer Street, upstairs apartment (R. p. 316), and from 6:00 p.m. to 11:30 p.m., 2828 Taft Street, upstairs apartment (R. p. 317). Officer McMannes swore that on January 17, 1966, he was on surveillance from 9:30 a.m. to 12:30 p.m. at 1503 Palm Street, Apartment 8, upstairs (R. p. 303), and from 9:00 a.m. to 11:45 a.m. at a duplex located at 3618 Fulton Street (R. p. 304). Officers Frangullie and Majors swore that on February 27, 1966, they were on surveillance from 5:00 p.m. to 7:30 p.m. at 3828 Underwood Street, Apartment No. 3, upstairs (R. p. 323) and from 4:00 p.m. to 6:30 p.m. at 2318 Branard Street, Apartment No. 5, upstairs (R. p. 326). Not only did Officers Frangullie and Majors do this, but they were able to convince the same magistrate that they had done so, and he issued warrants upon the two affidavits at 11:00 a.m. on the 28th day of February, 1966.

his constitutional rights that, "It is heroin. You have got me this time."[3] The record does not negate the fact that the heroin may have been abandoned or that it could equally as well have been possessed by numerous other persons. It is respectfully submitted that in this state of the record, there is no evidence upon which to base the conviction of this Petitioner. See *Thompson v. City of Louisville,* 362 U.S. 199, 80 S.Ct. 264, 4 L.Ed.2d 654; and *Garner v. Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207.

CONCLUSION

It is respectfully submitted that the questions presented in this case are of sufficient importance to warrant consideration by this Court and that the petition for writ of certiorari should be granted.

Respectfully submitted,



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3. Even though this statement was not an outright confession or admission of the Petitioner that he possessed the narcotics, the Trial Court refused, and was upheld by the Texas Court of Criminal Appeals, in refusing to give a charge on circumstantial evidence which was properly and timely requested.

APPENDIX A

Kenneth J. Brown, Appellant
No. 41,132 v. —Appeal from Harris County
The State of Texas, Appellee

OPINION

The offense is the possession of heroin; the punishment, 99 years.

Appellant at the outset urges this Court to overrule three of our relatively recent opinions. In Acosta v. State, 403 S.W.2d 434, we set forth an affidavit (which is identical in all material respects to the ones in the case at bar) made for the issuance of a search warrant, and held it to be sufficient. In Bosley v. State, 414 S.W.2d 468, and in Gonzales v. State, 410 S.W.2d 435, cert den., ____ U.S. ____, 18 L.Ed.2d 982, 87 S.Ct. 2044, we referred to the affidavit in Acosta, supra, and reaffirmed our holding that it was sufficient to show probable cause. In Gonzales, supra, we recognized that a conflict existed between the holdings of the several circuits and declined to depart from our prior holding until the Supreme Court of the United States settled the conflict. Such has not yet been done.

While appellant's counsel painstakingly briefed the question, he has only three circuit court cases which have been decided since our opinion in Bosley, supra, and all of them are from the Second Circuit. If U.S. v. Soyka, decided January 18, 1968, ___ F.2d ____, had been decided by our Fifth Circuit, we would probably be required to alter our statement in Gonzales, and wait no

longer for a direct ruling from the Supreme Court. The other two cases cause us no concern.[1]

A second phase of appellant's attack upon the affidavit is just as serious as his first. He was able to establish by motion to suppress and on his motion for new trial that the affidavit in question was used by the City of Houston Police as a model and copied in haec verba in other cases (except for the names, dates and places). While not affecting the validity of the affidavit in the case at bar, we join appellant in condemning the practice, if it is the case, of using one model affidavit to fit all situations. The simple reason for condemning such a practice is that no two cases are exactly alike and the use of stereotyped affidavits would run the risk of making the officer who executed the same guilty of false swearing. The enforcement of the law should never sink to such a level. We say that such practice, if it exists, does not affect the validity of the affidavit in the case at bar, because of the general rule that court will not look behind the allegations of an affidavit for the issuance of a search warrant.

His next contention is that the statements of the accused at the time of the discovery of the heroin by the searching officers were not admissible because he was at that time under arrest and had not been warned. The search warrant under which the officers were acting authorized a search of the premises under appellant's control. As we construe it, it further provided for the arrest of appellant in the event narcotics were found as the result of such search. The searching officers arrived at appellant's drug store where they found two clerks and

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1. U. S. v. Follette, 379 F.2d 846 (1967), and U. S. v. Warden of Attica State Prison, 381 F.2d 209 (1967).

a clean-up boy on duty. They proceeded to the rear of the store where they found appellant resting on a cot or bench. He and the other employees were placed near each other in the center of the store. After some 45 minutes of searching, a display case was raised and in a spot inaccessible except by raising the entire case, the searching officers found a brown paper bag. The officers who found the bag held it before them, and before looking into the same, asked appellant, "What is this?", to which appellant answered, "It is heroin, you have *got* me this time."

It is appellant's contention that this answer was inadmissible as an oral confession. The State's witnesses testified that appellant was not under arrest and stated that they had no reason to arrest him until they found the contraband. This would appear to be correct, and we hold the answer admissible as a statement made while not under arrest.

While we conclude that appellant was not under arrest at the time of the statement quoted above, we further call attention to our recent holding in Hill v. State, 420 S.W.2d 408, that Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, could not be interpreted to exclude res gestae statements.

Following the finding of the heroin at the drug store, the officers observed a rent receipt showing that appellant had paid the rent on a certain apartment in the city on the day preceding, and armed with a search warrant similar to the one for the drug store, conducted a search of such apartment. Therein they found a set of scales and pieces of paper bearing what was later shown by the testimony of the chemist to be particles of heroin. We

need not again discuss the sufficiency of the affidavit for the search warrant for the apartment.

Appellant's next ground of error is that the court erred in failing to charge the jury on the law of circumstantial evidence. As we construe the holdings of this Court in Moss v. State, 117 S.W.2d 428, and Powers v. State, 225 S.W.2d 176, such a charge was not required.

Appellant also contends that the evidence is insufficient to support this conviction and relies upon several cases. In Brock v. State, 285 S.W.2d 745, the contraband was found in a room commonly used by the public. In the case at bar, the only way one could gain access to the area where this heroin was found was by lifting a heavy display case and reaching into its inner enclosed section.

In Arsiaga v. State, 372 S.W.2d 538, the contraband was found in a cafe near where appellant had been. In the case at bar, appellant was shown to have managed the drug store in question and the enclosed section of the display case was not accessible to the public.

In Hilton v. State, 324 S.W.2d 5, the contraband was found in an apartment over which the accused was not shown to have any control. In this case both the witnesses for appellant as well as those for the State testified that appellant had control and management of the drug store in question.

In Martinez v. State, 340 S.W.2d 56, the contraband was found in the street some distance from the Gonzales automobile at a time when the accused and Gonzales were preparing to enter the automobile, and in Yonug v. State, 298 S.W.2d 176, the officers saw their agent

enter accused's room, but did not know whether he had gone further into the house or whom else besides accused their agent had seen.

What we have found as to the time of appellant's arrest precludes a discussion of appellant's contention that he should have been given the warning required by Miranda v. Arizona, supra.

Though not without considerable difficulty, we have concluded that reversible error has not been shown, and since the facts are amply sufficient to support the conviction, we affirm the judgment.

Woodley, Presiding Judge, Belcher, Judge, and Dice, Judge, concur in the affirmance of this conviction.

Morrison, Judge

(Delivered March 20, 1968)

A True Copy
Attest:

GLENN HAYNES
Glenn Haynes, Clerk,
Court of Criminal Appeals of Texas

Troy Bennett, Deputy

No. 41,132

KENNETH J. BROWN, Appellant,

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM HARRIS County

AFFIRMED

OPINION BY MORRISON, Judge.

Woodley, Presiding Judge, Belcher, Judge, and Dice, Judge, concure in this affirmance.

(Filed in Court of Criminal Appeals)

March 20, 1968

GLENN HAYNES, Clerk

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 41,132 styled:

KENNETH J. BROWN, Appellant

vs.

THE STATE OF TEXAS, Appellee

judgment of the Criminal District Court No. 3 (now 177th Judicial District Court) of Harris County was affirmed on March 20, 1968. Appellant's Motion for Rehearing overruled without written opinion on May 8, 1968, and mandate would have issued had same not been stayed by this Court to permit application for Writ of Certiorari to the Supreme Court of the United States.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on May 8, 1968, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and said judment has now become final on the docket of this Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas this 5th day of June A.D. 1968.

GLENN HAYNES
Glenn Haynes, Clerk
Court of Criminal Appeals of
Texas

APPENDIX B

Joe Givos ACOSTA, Appellant

v.

The STATE of Texas, Appellee.

(403 S.W.2d 434)

OPINION

MORRISON, Judge.

The offense is the possession of heroin with a prior conviction for possession of heroin alleged for enhancement; the punishment, 30 years.

The evidence introduced before the jury reflects that police officers of the Narcotic Division of the Houston Police, together with a representative of the Department of Public Safety, armed with a search warrant, arrived at appellant's home, intercepted him as he and his family were backing his automobile out his driveway, and exhibited the warrant to appellant and his wife. The family re-entered the house where a search was conducted, and, finally, under a flower which appeared to have been recently transplanted, a jar was found which was shown to contain over 100 grams of heroin in two rubber containers. The chain of custody was shown and the substance was identified by expert testimony to be 48 to 50 percent pure heroin. The prior conviction was established, and appellant did not testify or offer any evidence in his own behalf.

Since almost all the matters complained about by appellant in an exhaustive brief and argument occurred in the absence of the jury, they will be discussed in the order presented.

Appellant first contends that the heroin seized was inadmissible because the probable cause recited in the affidavit for the search warrant was insufficient under the holdings of the Supreme Court of the United States in a number of cases including Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503; Etchieson v. Texas, 378 U.S. 589, 84 S.Ct. 1932, 12 L.Ed.2d 1041; and Barnes v. Texas, 380 U.S. 253, 85 S.Ct. 942, 13 L.Ed.2d 818.

The affidavit in Aguilar, supra, recited that the affiants "have received reliable information from a credible person and do believe that heroin * * * and other narcotics and narcotic paraphernalia are being kept at * * * (petitioner's) premises for the purpose of sale and use contrary to the provisions of the law." The Court held that the above did not contain an affirmative allegation that the informant or the affiants spoke with personal knowledge.

The affiant in Giordenello v. United States, supra, recited:

> "The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heorin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

> And the complainant further states that he believes that _____ are material witnesses in relation to this charge."

The Court held that the above did not contain an affirmative allegation that affiant spoke with personal knowledge and failed to indicate any source of complainant's belief.

The affidavit in Etchieson v. State, Tex. Cr. App., 372 S.W.2d 690, recited:

> "My belief as aforesaid is based on the following facts:
>
> '(A) I have been informed of the existence of the foregoing set out facts by reliable, credible and trustworthy citizens of Dallas, Dallas County, Texas,
>
> '(B) and further from a source that we do not wish to divulge.' "

In a Per Curiam opinion Etchieson was reversed.

The affidavit in Barnes v. State, Tex. Cr. App., 390 S.W.2d 266, in which the writer dissented, and which was reversed by the Supreme Court of the United States in Barnes v. Texas, supra, upon their holding that the warrant for the arrest of Mrs. Barnes' husband contained no affirmative allegations that the affiant spoke with personal knowledge, did not indicate any source of complainaint's belief, nor set forth any other sufficient basis upon which the finding of probable cause could be made.

We will now set forth the affidavit before us in the case at bar:

> "On the 14th day of May, 1965, affiants received reliable information from a credible person that heroin was being possessed by Joe Givos Acosta, at

7515 Force Street, Houston, Harris County, Texas. Although I do not desire to name this person, on about four prior occasions he has given information to me concerning narcotics being possessed by certain individuals, and on every occasion his information has proven to be true. Based upon the information he gave to me, affiants on the morning of the 14th day of May, 1965, set up surveillance of the house located at 7515 Force Street, and from approximately 7:00 a.m. to 10:00 a.m. of that day we observed several persons whom we know to be users of narcotics, enter the house, remain for approximately five minutes each, and then leave."

[1] Because of the late filing of the officer's return, the court heard evidence on the issue of probable cause in the absence of the jury, and, in the course thereof, it was developed that two of the "several people" whom the officers observed to enter appellant's house, remain approximately five minutes and then leave were Victor Valdez and Martin Damian, each of whom had narcotic charges pending against them at the time of appellant's trial and each of whom were known by the officers to be narcotic addicts. We hold that the affidavit in the instant case does set forth a sufficient basis upon which a finding of probable cause could be made. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684. The cases cited by appellant do not support his contention that the trial court erred in refusing to grant his motion to suppress evidence seized under the search warrant.

* * * * * *